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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, *et al.*,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF BUILDING AND CONSTRUCTION TRADES COUNCIL, ITS AFFILIATED UNIONS, AND TEAMSTERS UNION LOCAL NO. 631

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To the Honorable Earl Warren, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 234 F. 2d. 217 and in 54 L.R.R.M. 2487. The opinion of the District Court (Petition for Writ, App. A, pp. 16a-22a) is still unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether a United States District Court or Court of

Appeals, required to decide the applicability of the Railway Labor Act to the non-transportation employees of an air carrier in order to determine its own jurisdiction under the Norris-LaGuardia Act to enjoin peaceful picketing by such employees pursuant to a labor dispute, is bound by a National Mediation Board precedent interpreting the RLA to apply to non-transportation employees of the carrier at another installation performing substantially similar duties, if the Court is convinced, on the basis of statutory, judicial, and administrative authority that the NMB has misinterpreted its jurisdiction under RLA as a matter of law?

2. Whether title II of the Railway Labor Act (45 U.S.C. § 181, *et seq.*) applies to the employees of a carrier by air at an installation geographically remote from the carrier's air terminals, and at which neither the carrier nor its employees are performing any functions in any way connected with air transportation, merely because the craft skills of such employees are substantially identical to the craft skills of other employees at the carrier's airline terminals?

STATEMENT OF THE CASE

1. Nature of the Labor Dispute

For approximately twelve years prior to July 15, 1963, Respondent Building and Construction Trades Council (BCTC) and its affiliated unions, manned the jobs of the various Atomic Energy Commission (AEC) contractors at the Nevada Test Site, under collective bargaining agreements with such contractors. These contractors included Reynolds Electrical & Engineering Co. (REECO), the AEC support contractor performing various housekeeping, construction, and technical services both at the Nuclear Rocket Development Station (NRDS), formerly called "Area 400" —and at the weapons testing area of the Test Site, located some twenty-six miles away (Arnold Afft., R 111-115; R 275).

The wage scales prescribed by these labor agreements

were certified by the United States Department of Labor as the "prevailing wages" for the Southern Nevada Area under the Davis-Bacon Act, 40 U.S.C. § 276(a). (Arnold Afft. R 112).

On July 15, 1963, Pan American World Airways, Inc. (Pan American) replaced REECO as the support contractor in the NRDS area under a contract dated June 28, 1963 (Arnold Afft., R 112; R 17, P's Exh. "A"), between Pan American and the Space Nuclear Propulsion Office (SNPO), a joint administrative agency of AEC and NASA, created to carry on development of nuclear reactor engines and vehicles for interplanetary space travel (R 2-3).

All members of Respondent unions, many of whom had worked at the Test Site from its inception, were replaced by Pan American with new employees (Arnold Afft., R 113) who, in the main, were recruited in Arizona, New Mexico, Texas, and elsewhere (Arnold Supp. Afft. R 335). Although Petitioner's new employees performed substantially the same work as had been performed by REECO's local union employees until July 15, 1963 (R 335-336), their wage rates ran from $1.65 to $2.00 per hour less than the wage rates prescribed by the labor agreement between Respondent unions and REECO, which had been recognized by the Department of Labor as "prevailing wages" for the area. (R 112, compare BCTC wage rates at R 116 with Pan American-TWU wage rates, R 17; P's Exh. "A"—See also R 249).

Pan American sought to justify these lower wage rates on the ground that they had been prescribed by a labor agreement between Pan American and Transport Workers Unions of America, AFL-CIO (TWU), signed September 14, 1962 (R 17; P's Exh. "A"), many months before Petitioner had even submitted a bid to render support services at NRDS.[1]

[1] Although the September 14, 1962 agreement between Pan American and TWU, covering airline mechanics and ground service

On July 30, 1963, the unions affiliated with Respondent BCTC, with the sanction of BCTC, commenced to picket Petitioner Pan American in the NRDS area of the Nevada Test Site to protest "government interference" and replacement of local union men by Pan American with employees receiving "sub-standard wages." (Arnold Afft. R 113). No claim to represent the current employees was made by the picketing unions, since the unions did not represent Pan American's new employees. (Arnold Afft. R 114-115). It is not suggested that the picketing was anything but peaceful and orderly. The picket signs were directed exclusively against Pan American's operations at NRDS, and not against any other AEC contractor either at NRDS, or in the weapons testing area of the Test Site (Arnold Afft. R 114).

2. Proceedings in the District Court

On July 31, 1963, Petitioner filed a Complaint in the United States District Court for the District of Nevada, to enjoin the picketing. Apparently anticipating a defense under the Norris-LaGuardia Act (29 U.S.C. 101, *et seq.*), Petitioner pleaded facts tending to show that Petitioner was a carrier within the Railway Labor Act (RLA), (45 U.S.C. § 151, *et seq.*), that the National Mediation Board (NMB) had jurisdiction of the dispute under the RLA, and that the picketing was in furtherance of a representation dispute and an interference with the processes of RLA (R 1-16).

After an informal conference, but without a hearing, the District Court issued a temporary restraining order and an order to show cause, returnable August 2, 1963 (R 240; R 48-53).

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employees, was obviously negotiated in the light of economic and industrial conditions existing at Pan American's airline bases and in its Guided Missiles Range Division (GMRD) at Cape Canaveral (Cape Kennedy), Florida, in conformity with the Railway Labor Act (RLA) scheme of system-wide labor agreements for each craft

At the hearing on August 2nd., Respondents introduced in evidence as their Exhibit "A", Appendix B of the contract of June 28, 1963 between SNPO and Petitioner, which defined the scope of Petitioner's work at NRDS (R 300-305). Respondents also put on the stand Petitioner's Project Manager, R. L. Yordy. Both the Exhibit and Mr. Yordy's testimony showed, without substantial dispute, that in its support activities at NRDS, Petitioner was not performing any functions either directly or indirectly related to its air transportation business (R 300-305, Testimony of Yordy; R 260-299), and that functions being performed by Petitioner at NRDS and the classifications of employees used were substantially identical to those at Cape Canaveral (R. 284). Petitioner made no attempt to rebut this evidence, but introduced in evidence only the NMB's 1956 decision in NMB File No. C-2505, extending its 1950 certification to include Petitioner's ground maintenance employees at Cape Canaveral, and certain telegrams purporting to show that NMB had intervened in the NRDS dispute.

Upon this evidence, the District Court found that the activities of Pan American at NRDS bear only a "tenuous, negligible and remote relationship to Pan American's commercial transportation activities"[2] and concluded that, with respect to its NRDS activities, Petitioner is not a "carrier" covered by the RLA (45 U.S.C. § 181); that, consequently, there is no occasion for considering whether the Norris-LaGuardia Act must be "accommodated" to the

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or class of employees, it provided that it should extend to all Pan American's operations (R 17; P's Exh. "A"). See "Understanding" and "Letter of Agreement" following page 57 of the September 14, 1962 Agreement).

[2] See District Court's Opinion (Petition, App. A., p. 22a)
On the same evidence, the Court of Appeals found that "We do not have here a problem of determining whether the relationship of these employees to transportation is 'tenuous', 'remote', or 'negligible'. In our case the relationship is non-existent." (Pet., App. A, p. 10a).

purposes and processes of RLA; and that, by reason of the withdrawal of jurisdiction from Federal Courts under the Norris-LaGuardia Act, the Court is without jurisdiction to enjoin peaceful picketing in the course of a labor dispute.[3] (Decision of District Court, Petition, Appendix A, pp. 16a-22a.) Accordingly, the Court denied the preliminary injunction and dissolved the temporary restraining order.

Petitioner immediately filed Notice of Appeal, and applied under FRCP 62(c) for an injunction pending appeal. Over objection of Respondents that the District Court, having determined that it was without jurisdiction to grant a preliminary injunction, was also without jurisdiction to grant an injunction pending appeal, the Court restored the temporary restraining order for a limited period of ten (10) days to enable Petitioner to make such application before the Court of Appeals under FRCP 62(g). (Docket Entry, R 175.)

3. Proceedings Before the Court of Appeals

On August 8, 1963, Petitioner applied to the Court of Appeals, pursuant to FRCP 62(g), for an injunction pending appeal, and, on the same day, the Court granted a temporary injunction valid until hearing and determination of the motion (R 135-137). The application was opposed (R 239-344). After oral argument on August 15th, the Court granted an injunction pending appeal (R 345-347). The appeal was argued on its merits on October 10, 1963 before Madden, Judge of the Court of Claims, and Hamlin and Browning, Circuit Judges (R. 353).

On November 5, 1963, in an Opinion written by Judge

[3] It can hardly be doubted that the picketing involved was within the protection of Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104). See *Marine Cooks & Stewards* v. *Panama S.S. Co.* (1960), 362 U.S. 365, 4 L. Ed. (2d) 797, 80 S. Ct. 779, Reh. Den. 363 U.S. 809; *Afran Transport Company* v. *National Maritime Unions*, 169 F. 2d. 416, 422-423 (1958).

Madden, former Chairman of the National Labor Relations Board, the Court of Appeals held the RLA inapplicable to the non-transportation activities and the non-transportation employees of Pan American at NRDS and affirmed the decision of the District Court that it was without jurisdiction, under the Norris-LaGuardia Act, to enjoin peaceful picketing at that facility (R 355-364, Petition, App. A, 2a-15a).

On December 3, 1963, Petitioner presented an *ex parte* application to Judge Hamlin for a Stay of Mandate pending application to the Supreme Court for a Writ of Certiorari, and should that be granted, then until ten (10) days after disposition of such review. A number of affidavits in support of this application was filed (R 366-396; Pet. App. C., pp. 62a-78a). The stay was issued *ex parte* (R. 398-400). Thereafter, Respondents moved to strike from the Record on Petition for Certiorari the application for stay and supporting affidavits (R 402-410). The Court of Appeals denied the motion, stating that "while such application and affidavits were not before the Court at the time of its decision they are a part of the history of the case." (R 411).

So, although the District Court held on August 2, 1963 that it was without jurisdiction to issue an injunction against peaceful picketing by Respondent unions, and although the Court of Appeals affirmed this decision on November 5, 1963, Respondents have, nevertheless, been continuously enjoined from such picketing from July 31, 1963 to the present date.

4. Proceedings before the National Mediation Board.

At the District Court hearing, Petitioner introduced, over objection, certain telegrams pertaining to an earlier representation dispute between Pan American and Culinary Workers Union, Local No. 226 (Culinary Union) (R 177, unattached Exhibits), which is not affiliated with Respondent BCTC (R 111).

Respondent BCTC and its affiliated unions first learned of the intention of NMB to hold a hearing at a time certain on the question of its jurisdiction over Pan American employees at NRDS through a telegram from the Board dated August 7, 1963 (five days after the District Court hearing and decision) setting August 20, 1963 as the NMB hearing date (Afft. of Murray Gartner R 192-193, R 207).

Respondents advised NMB that they were making no claim of representation, informed NMB of the District Court's decision holding RLA inapplicable of NRDS, and took the position that the question of NMB's jurisdiction had been resolved by that decision. (Appendix A, Exh. A-1).

On August 20 and 21, NMB, nevertheless, proceeded with a hearing in which Respondents participated under protest. Respondents took the position that the Board hearing was premature as to Respondents, since they had made no claim to represent Pan American employees at NRDS, and that the Board was without jurisdiction over the NRDS employees in any event, by reason of the authorities relied on by the District Court in its decision. (Appendix A, Exh. A-1).

NMB, though advised that a review of the District Court's decision was pending before the Court of Appeals for the Ninth Circuit and though requested to withhold its ruling pending the decision of the Court of Appeals (Appendix A, Exh. A-4), rendered its ruling on October 29, 1963 (Pet., App. A, pp. 40a-43a). Stating its conclusions only, and citing no authorities, the NMB found that Petitioner and its employees were "respectively a carrier and employees within the meaning of the Railway Labor Act" with respect to Petitioner's NRDS operation, because of "a functional relationship to the over-all operations of this carrier." (Pet., App. A, pp. 40a-43a).

The Board decision having been called to the attention of the Court of Appeals by Petitioner after the Court

had written, but before it had filed, its Opinion (Pet., App. A, p. 15a), the Court took note of the Board's decision in the following words:

> "The Board stated no reason for its conclusions except the reason given it in the Canaveral Case, discussed in our opinion. We adhere, therefore, to what we had decided before receiving the advice referred to above."

Since rendition of the opinion of the Court of Appeals, Respondents have requested the NMB to reconsider its decision in the light of that opinion (App. A, Exhs. A-4, A-5, A-6 and A-7). However, the Board has not, thus far, indicated its disposition in the matter (App. A, Exh. A-8).

5. Proceedings Before the National Labor Relations Board

On December 5, 1963, one month after rendition of the opinion of the Court of Appeals, Respondents BCTC and Teamsters Union filed a Petition with the National Labor Relations Board, asking to be certified as bargaining representatives of all maintenance, operation, and support employees of Pan American at NRDS (excepting only office employees). (App. A, Exh. A-9.)

The NLRB has withheld action on this petition, apparently pending disposition of the present proceeding before the Supreme Court. The apparent reason for this delay is the Board's uncertainty as to whether NLRB or NMB has jurisdiction over Petitioner's NRDS employees. (App. A, Affidavit of George Rudiak.)

SUMMARY OF RESPONDENTS' ARGUMENT

Respondents, Building and Construction Trades Council, (BCTC), its affiliated local unions, and Teamsters Union Local No. 631 (Teamsters Union), respectfully oppose the Petition for Writ of Certiorari, on the following grounds:

1. That a decision of an administrative agency, such as

the National Mediation Board, which is plainly wrong as a matter of law, and which was made without giving the parties an opportunity to present oral argument to the members of the Board and which does not state reasons, findings or conclusions on the material issues of fact and law presented on the record, contrary to good principles of administrative procedure as embodied in the Administrative Procedure Act, is not the kind of administrative practice which warrants a variation from the language of the applicable Federal statute. Nor does the overruling of such administrative decision by a unanimous Circuit Court of Appeals present the kind of question calling for the issuance of the Writ of Certiorari by the Supreme Court of the United States.

2. That the Court of Appeals, affirming the District Court, has correctly decided the question of Federal law in conformity with judicial and administrative precedent, in a manner consonant with both the express language and the evident purpose of the Railway Labor Act (45 U.S.C. 151, *et seq.*).

3. That there is no conflict in decisions between the decision of the Court of Appeals and any decision of the Supreme Court or any other Court of Appeals.

4. That the judgment sought to be reviewed is an interlocutory judgment, denying Petitioner's application for a preliminary injunction, and that no over-riding necessity has been shown such as would warrant a departure from the usual reluctance of this Court to review non-final judgments on certiorari.

5. That the effect of the decision below is to delimit the jurisdiction of the National Mediation Board so as to prevent unwarranted encroachment by that Board upon the area of regulation allotted by Congress to the National Labor Relations Board.

6. That the labor dispute which is the subject matter of this litigation may be regulated without danger to the nation's interplanetary space program through the processes of the National Labor Relations Board in such manner as to effectuate the Congressional policy under the Labor Management Relations Act of permitting employees to bargain collectively through representatives of their own choosing, rather than being compelled, through a strained construction of the Railway Labor Act, to treat with their employer through a bargaining agent not selected by them and to accept terms and conditions of employment to which they have not assented.

REASONS WHY THE WRIT SHOULD BE DENIED

1. There Is No Conflict of Decisions. On the Contrary, the Court of Appeals Correctly Decided the Question of Federal Law is Conformity with the Weight of Judicial Administrative Precedent, and in Harmony with Principles Enunciated by the Supreme Court.

In affirming the District Court's order denying Pan American's motion for a preliminary injunction, the Court of Appeals cited as "directly in point" the decision of the District Court of Minnesota in *Jackson* v. *Northwest Airlines*, 70 F. Supp. 501 (1947), and quoted with approval the following language therefrom quoted in the affirming opinion of the Court of Appeals for the Eighth Circuit, *Northwest Airlines* v. *Jackson*, 185 F. 2d. 74 (1950):

> "The Railway Labor Act was intended to apply only to transportation activities and that work which bears more than a tenuous, negligible and remote relationship to the transportation activities. It was not intended to apply to all work, regardless of its connection to transportation, merely because the company carrying on the work included carrier activities within its company functions."

The decision below is also in direct accord with an earlier Ninth Circuit decision in *Anderson* v. *Bigelow*, 130 F. 2d. 460 (1942) (not cited in the opinion below), where an injunction was denied under the Norris-LaGuardia Act because of inapplicability of the Railway Labor Act to the independent over-the-road trucking operation of a railcarrier then in Federal Receivership. It is in harmony with the Second Circuit decision in *Walling* v. *The Connecticut Company*, 154 F. 2d. 552 (1946), with the District Court decision in *Roland* v. *United Airlines*, 75 F. Supp. 25 (1947) and finds support in principle in the following rulings of the National Labor Relations Board, Interstate Commerce Commission, and National Mediation Board: *Northwest Airlines, Inc.* 47 NLRB 498, 12 LRRM 10 (1943); *Hudson and Manhattan Railroad Co. Employees-Railway Act*, 245 I.C.C. 145, and *File No. R-2546, Vol. II NMB Craft or Class Determinations*, page 68.

The holding below is also in harmony in principle, if not in decision, with doctrine long enunciated by this Court. Thus, in *Kansas City S.R. Co.* v. *United States*, 282 U.S. 761, 764, 75 L. Ed. 684, 686 (1931), this Court said:

> "There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as such common carriers and are not subject to the provisions of the act."

And, in *Virginian R. Co.* v. *System Federation*, 300 U.S. 315, 81 L. Ed. 789, 57 S. Ct. 592, in holding that the commerce power was broad enough to sustain a mandatory injunction requiring a rail carrier to "treat with" its "back shop" employees under Section 2 (Ninth) of the RLA where such employees, though not themselves engaged in interstate transportation, repaired the locomotives and cars used by the carrier in its interstate service and so were physically and functionally a part of that service, this Court first elaborated the "tenuous, negligible, remote" test for deter-

mining whether a sufficiently substantial relationship exists between the transportation and non-transportation activities of the carrier.[4] It was this test which was later applied in *Jackson* v. *Northwest Airlines, supra,* as well as in the administrative rulings of N.L.R.B., I.C.C., and N.M.B., above cited, and by the District Court below.

The decision below is, therefore, in harmony with principles approved by the Supreme Court, with past decisions of the Second, Eighth, and Ninth Circuits, and with a substantial body of administrative precedent. It accords, moreover, with the statutory language and evident purpose of the RLA to regulate labor relations in the rail and air transportation industries in order "to keep transportation moving," (Pet., App. A, p. 7-a), and serves to delimit the permissible sphere of NMB jurisdiction by confining it to transportation activities and those closely and substantially related thereto, thereby preventing an unwarranted encroachment by NMB upon the jurisdiction prescribed by Congress for the NLRB under legislation designed to regulate labor relations in commerce (other than in the air and rail transportation industries). (Labor Management Relations Act, 29 U.S.C. 151, *et seq.*)

In its 1956 Cape Canaveral decision, upon which Petitioner so heavily relies, the NMB arbitrarily dismissed and refused to follow the long line of judicial and administrative precedent holding that the RLA does not apply to the non-transportation activities of a carrier, or such activities as are not closely and substantially related thereto. In its 1963 NRDS decision, the NMB refused to re-examine, but simply

[4] Although the Opinion below regards *Virginian R. Co., supra,* as irrelevant because concerned with the scope of the commerce power rather than with statutory interpretation as to applicability of RLA, we respectfully submit that, if irrelevant, the decision is mainly so only because the Court below found no need to apply the "tenuous, negligible, remote" test to a situation in which a relationship to transportation was completely non-existent.

adhered to its earlier ruling which served to expand unlawfully its own jurisdiction.

The so-called judicial review of the NMB's Cape Canaveral ruling to which Petitioner refers is the one-page opinion in *Biswanger* v. *Boyd*, 32 CCH Labor Cases § 70,840 (not officially reported). Since the union which sought certification by NMB dropped out of the District Court suit before decision, it is, to say the least, questionable to what extent the *Biswanger* case may be regarded as a judicial review of the NMB's Cape Canaveral decisions, since the ultimate parties were different.

At all events, conflict of a Court of Appeals judgment with a random District Court decision, or with an administrative ruling contrary to the general tenor of judicial and administrative authority is hardly sufficient reason for issuance of the Writ. See *U.S.* v. *Constantine*, 296 U.S. 287, 290; *Shapiro* v. *U.S.* 335 U.S. 1, 4.[5]

[5] Amicus Curiae has cited *United States* v. *Ruzicka*, 329 U.S. 287, 288, 295 (1946) and *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, 299 (1946) as bearing on its contention that the writ should be granted to resolve a conflict between the decision of the Court of Appeals and a prior decision of the agency charged with administration of the act. Neither case supports this contention.

In *Ruzicka*, it was held that the District Court had correctly ruled that where the statute itself provides for initial adjudication of a disputed fact question before the Secretary of Agriculture with provisions for judicial review, a person subject to the act may not dispute such fact issues in a judicial enforcement proceeding brought by the Secretary without having first sought to challenge the factual basis of the claim in administrative proceedings. The Court expressly withheld opinion on whether the District Court should have stayed enforcement proceedings pending an administrative determination, since the application for a stay had been withdrawn. In the case at bar, not only was there no express statutory mandate for a prior administrative determination, but also, the question which the District Court was called upon to resolve was a condition precedent to its own jurisdiction, and one which it could and did decide as a question of law upon undisputed facts. Furthermore, since Petitioner had invoked the equitable powers of the Court, obviously Petitioner would not, and did not,

2. The Judgment Sought to be Reviewed on Certiorari is a Non-Final Judgment Affirming a Denial of a Preliminary Injunction, and so Over-riding Necessity has been Shown to Warrant a Departure from the Usual Reluctance of this Court to Review Non-final Judgments on Certiorari.

In *American Construction Co.* v. *Jacksonville T. & K. R. Co.*, 148 U.S. 372, 384, the Supreme Court said:

> "... this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

An example of such extraordinary circumstances, calling for departure from the usual practice of this Court of declining to review non-final judgments on certiorari is to be found in *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 584-585, where this Court was called upon to review the Constitutional validity of a wartime Presidential order seizing, and subjecting to operation under government control, almost the entire steel industry, in the interest of averting a national steel strike.

Granting the importance of the national space effort being furthered at NRDS, certainly no circumstances of comparable gravity, Constitutional significance, or probable and immediate consequences are to be discerned from the present application.

In the first place, refusal of the Writ by granting finality to the judgment below, would delimit the boundary between

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ask the Court to stay its proceedings to await an NMB determination. The Court was therefore necessarily required to rule. *Rothensies* is even less in point, for it did not involve a question of applicability or jurisdiction under the statute, but a judicial determination of a question of substantive law contrary to the view taken by the administrative agency.

the jurisdiction of NMB and NLRB, and enable NLRB to proceed in its usual manner to determine the appropriate bargaining unit for Pan American's NRDS employees, to hold representation elections, and to certify bargaining representatives. This is the very procedure which Congress contemplated under LMRA for the orderly settlement of what is now a representation dispute. It differs only from what would occur in an NMB-conducted representation proceeding in that under LMRA a locally-oriented craft or multi-craft unit could conceivably result while under RLA a system-wide craft or class unit (in which the 140 local craftsmen involved would be submerged by airline personnel with whom they have no geographic or functional affinity) would be a foregone conclusion.

In the second place though a second consequence of denial of the Writ would be to free Respondents to resume their picketing, such picketing is still not without legal limits. If it transcends peace and good order, a state court may intervene. If it, in fact, threatens the national health or safety, the Presidential emergency procedures prescribed by 29 U.S.C. § 176-§ 180 are available. The NMB is not the only Federal agency competent to cope with the problem. The processes of the NLRB, the Federal Mediation and Conciliation Service, and of the President's Missile and Space Sites Labor Board, created by Executive Order No. *10946*, are equally efficacious.

3. A Court called upon in the first instance to decide the applicability of the Railway Labor Act in order to determine its own jurisdiction to issue a preliminary injunction is not bound by a prior National Mediation Board ruling where the question relates to the extent of the Board's jurisdiction under the statute and is a question of law turning on construction of the statute.

Respondents do not question that, under certain circumstances at least, determinations as to the scope and effect

of a statute by the administrative agency charged with its enforcement are entitled to deference by a reviewing court, at least when they have evidentiary support and are not inconsistent with law. See *United States* v. *Drum*, 368 U.S. 370 (1962); *N.L.R.B.* v. *E. C. Atkins & Co.*, 331 U.S. 398 (1947); *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944); and *Gray* v. *Powell*, 314 U.S. 402 (1941), cited in Petition for Writ of Certiorari, page 13.

Each of these cases, however, involved a direct judicial review of an administrative ruling, while both Petitioner (Pet., pp. 2, 17) and Amicus Curiae (TWU Brief, p. 5) admit what is apparent—that the case below did not involve a direct judicial review of either the 1956, or the 1963, NMB decisions.[6] To be sure, the Court of Appeals considered the NMB's views "with deference," but did not find them "persuasive." (Pet., App. A, p. 12a).

The question, then, is not as to the degree of conclusiveness which the Court should have given the NMB's Cape Canaveral decision if it had been directly reviewing it in a proceeding brought for that purpose, but the extent to which the Court was bound by such decision as precedent in a judicial proceeding in which the Court, in the first instance, was called upon to determine its own jurisdiction to issue the injunction sought by Petitioner, where such jurisdiction depended upon the statutory construction as to the extent of the Board's authority under the Act over non-transportation employees of a carrier.

In *N.L.R.B.* v. *Hearst Publications*, *supra*, 322 U.S. 111, 130, this Court intimated that a different standard of deference to the administrative ruling may be appropriate in such a case than that required upon direct judicial re-

[6] In fact, the NMB had not even noticed its NRDS hearing when, on August 2, 1963, the District Court held its hearing and made its order finding the RLA inapplicable to NRDS and denying an injunction.

view. The Court said:

> "Undoubtedly, questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute."

However, in *Hearst Publications*, since the question of whether or not the relationship of employer and employee existed was one which NLRB, rather than the Court, was obliged to determine initially under a broad statutory definition of the term "employee", this was held to be a matter entrusted to the expertise of the Board and the function of the reviewing Court was said to be limited to a determination as to whether the Board's ruling has "warrant in the record" and a reasonable basis in law. In other words, even on a question left to administrative discretion, the ultimate determination as to whether the administrative interpretation had a reasonable basis in law was for the Court. In the case at bar, where the Court was necessarily making the initial determination and the question involved was one of interpretation of the statute on a jurisdictional question, it can hardly be doubted that the Court had the right to make the final decision upon the issue as a question of law, in the light of all applicable precedent, and not of NMB's ruling alone.

Thus, though administrative decisions within the area of discretion conferred upon the agency by Congress are entitled to due weight, the ultimate determination as to whether the agency has acted, or is about to act, without, or in excess of its statutory jurisdiction, is for the courts, even in the absence of express statutory authority for review of such decision. *Leedom* v. *Kyne*, 358 U.S. 184, 43 LRRM 2222 (1958). And actions of the National Mediation Board in excess of jurisdiction are no more impervious to judicial correction or restraint in such circumstances than those of any other agency. *Air Line Dispatchers Ass'n.* v. *NMB*, 189

F. 2d 685, 28 LRRM 2048, *cert. den.* 342 U.S. 849 (1951); *Association for Benefit of Non-Contract Employees* v. *NMB*, 218 F. Supp. 114, 53 LRRM 2085 (1963).

What may be garnered from the authorities is that, even on direct judicial review of decisions made in the first instance by an administrative agency, the ultimate responsibility for determining questions of law (*Securities and Exchange Commission* v. *Chennery Corp.*, 318 U.S. 80, 63 S. Ct. 454; *E. Anthony & Sons* v. *N.L.R.B.*, 163 F. 2d 22, *cert. den.* 332 U.S. 773), and, particularly, questions of jurisdiction involving interpretation as to the limits of the agency's statutory powers (*Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215, *reh. den.* 323 U.S. 809; *Cardillo* v. *Liberty Mut. Ins. Co.*, 330 U.S. 469, 91 L. Ed. 1028, 67 S. Ct. 801; *Brannan* v. *Stark*, 185 F. 2d 871 affirmed 342 U.S. 451, 96 L. Ed. 497, 72 S. Ct. 433) is for the courts. And a cognate doctrine is that, even though supported by evidence, an administrative determination of certain fundamental facts bearing upon a constitutional or jurisdictional issue is not conclusive upon the courts, which have the power and duty to exercise their own independent judgment thereon (*U.S.* v. *Idaho*, 330 U.S. 469, 91 L. Ed. 1028 67 S. Ct. 801; *Crowell* v. *Benson*, 285 U.S. 22, 76 L. Ed. 598, 59 S. Ct. 285; *Cox* v. *U.S.*, 157 F. 2d 787, affirmed 332 U.S. 442, 92 L. Ed. 59, 68 S. Ct. 115, *reh. den.* 68 S. Ct. 449) at least in the absence of a specific statutory provision lodging the decision of the jurisdictional question in the agency (*Utah Cooper Co.* v. *Railroad Retirement Board*, 129 F. 2d 35, *cert. den.* 317 U.S. 687).

It is respectfully submitted, therefore, that the NMB's Cape Canaveral decision was given by the Court of Appeals the weight to which it was entitled—that of a precedent to be deferentially considered, but which the Court declined to follow in the belief that it was in error as a matter of law on a question going to the Board's jurisdiction.

4. The Court of Appeals correctly decided that the RLA does not apply to non-transportation employees of an air carrier, notwithstanding that such employees may have the same craft skills and do work substantially identical with that of the carrier's transportation employees, and correctly refused to follow an NMB precedent to the contrary which it regarded as erroneous as a matter of law.

The record made at the hearing in the District Court below, which is the record under review by the Court of Appeals, shows only that the functions performed by Pan American at Cape Canaveral are identical with the functions performed by Pan American at NRDS, and that Pan American uses identical classifications of employees at both facilities (Testimony of Yordy, R 284). The District Court record will be searched in vain for any evidence that the functions performed by Pan American or the classifications of employees used by it at Canaveral and NRDS are identical, or even similar, to functions and classifications at Pan American's airline bases, or that there is interchangeability of personnel between the two types of facilities,[7] or that there are common executive controls and labor policies pertaining to both.

Such assertions in the Petition, and in the Brief of Amicus Curiae, are mere inferences from NMB's 1956 decision finding such community of interests between Petitioner's Cape Canaveral and its airline employees.

Assuming *arguendo* that these inferences find evidentiary support in the District Court record, it is respectfully submitted that they still would not detract from the correctness of the decision below.

(a) The Court of Appeals correctly refused to accept the

[7] In fact, there was minimal interchangeability of personnel even between Cape Canaveral and NRDS. Of the 242 wage-rated employees at NRDS, only 5 transferred from Cape Canaveral (R. 22).

NMB's too-literal and unrealistic construction of RLA, which would have had the effect of extending NMB jurisdiction to every non-transportation activity of an air carrier, in derogation of NLRB's jurisdiction under LMRA. The Court of Appeals thus established a workable rule by which the permissible limits of NMB jurisdiction may be determined.

The Court of Appeals rejected as not "persuasive" the test of statutory coverage used by NMB in its Cape Canaveral decision, where the NMB had said:

> "The test is simple: Is the employer a common carrier by air engaged in interstate commerce? Does the individual perform any work as an employee? If both answers are in the affirmative, the Board's jurisdiction is clear."

Such a literal construction of the statute has been criticized before as "too literal" and "unrealistic." See *Roland* v. *United Airlines, supra*, 75 F. Supp. 25; *Nelson* v. *Aguilines, Inc.*, 70 F. Supp. 495, 500; *Walling* v. *The Connecticut Co., supra*, 154 F. 2d. 552; *Jackson* v. *Northwest Airlines, supra*, 70 F. Supp. 501, 506; and *Northwest Airlines, Inc., supra*, 47 NLRB 498, where, in disposing of a similar argument, the NLRB said:

> "We therefore reject the foregoing argument of the Company which would lead to the result that all activities of a concern are exempt from the provisions of the Act (National Labor Relations Act) if it (the Company) operates to any extent however incidental, as a carrier by air."

Since it is obvious that under the literal test proposed by NMB, that Board could claim jurisdiction over General Motors, if that company, in the course of its widespread operations, should acquire a small commercial airline, as well as claiming jurisdiction over the employees of Pan American's hypothetical shoe factory, it is self-evident that

such a test would be completely unworkable in establishing the permissible outer limits of NMB jurisdiction, and could only result in an unwarranted self-aggrandizement of jurisdiction by NMB at the expense of the NLRB, the agency which intended to regulate labor relations in all but the rail and air transportation industries. The Court of Appeals, therefore, not only construed the express language of RLA correctly, in the light of the evident purpose of the act, to "keep transportation moving," but also with due regard to the purpose of Congress in enacting LMRA. The decision below provides a workable rule for delimiting the operating spheres of NMB and NLRB under the two Acts.

On the other hand, observance of the test proposed by NMB at Cape Canaveral could only result in chaos and confusion as between the two agencies.

Reading the RLA textually, but as a whole,[8] the Court of Appeals noted that the matter is not quite as simple as Petitioner and NMB, in its Canaveral decision, suggest—for the RLA defines an "employee" as one performing such work as is defined as that of an employee by I.C.C., and, obviously, I.C.C. would not be concerned with defining work of any employees other than those "engaged in . . . the transportation of persons or property wholly by railroad," 49 U.S.C. 151. In *U.S.* v. *American Trucking Associations*, 310 U.S. 532, construing Section 13(b) of FLSA, which ex-

[8] In *U.S.* v. *American Trucking Associations*, 310 U.S. 532, 543-544, *supra*, pointing out that "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function," and reviewing the canons of statutory construction applied by the courts, this Court condemned the "literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion", and stated further:

> "Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to settled policy, 'excepting as a different purpose is plainly shown.'"

cepts from the provisions of that Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service • • • ", this Court, considering the historical policy of Congress to regulate "transportation employees in matters of movement and safety only" refused to interpret the word "employee" as used in Section 204(a) of the Motor Carrier Act, 1935 to include as I.C.C.-regulated employees, exempt from coverage under FLSA, certain non-transportation employees of the truck lines. By parallel reasoning, and quoting from the opinion of this Court in *American Trucking Association, supra,* the District Court in *Roland* v. *United Airlines,* 75 F. Supp. 25, *supra,* held certain non-transportation employees of the airline not to be within the RLA exemption of FLSA, saying:

> "The exemption of the Fair Labor Standards Act refers to employees of those carriers by air whose business is regulated under the Civil Aeronautics Act. That business is 'air transportation' and not any other business in which a carrier may chance to engage."

Apparently, conceding that NMB's Cape Canaveral decision cannot be justified by a literal reading of the RLA alone, Petitioner points out that NMB assigned additional reasons for its decision. Petitioner claims the Court of Appeals failed to take account of such reasons. Of course, if the Court of Appeals ruled correctly, its decision will not be disturbed even though based on improper grounds.[9] In fact, however, the "further reasons" assigned by NMB in its Cape Canaveral decision were thoroughly discussed in the briefs below, but, apparently, the Court did not regard such reasons as meriting comment in its opinion.

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[9] *Exner* v. *Sherman Power Constr. Co.* (C.C.A. 2nd), 54 F. 2d 510, 80 ALR 686; *Bank of Havelock* v. *Western U. Teleg. Co.* (C.C.A. 8th), 151 F. 522, 4 LRA (NS) 181; *Crossett Lumber Co.* v. *U.S.* (C.C.A. 8th), 87 F. 2d. 930, 109 ALR 1348; *Worcester Felt Pad Corp.* v. *Tucson Airport Authority* (CA 9), 233 F. 2d. 44, 59 ALR 2d. 1121.

We will now briefly review NMB's alternate grounds of decision.

(b) The alternate grounds of decision assigned by NMB in its Cape Canaveral ruling are unsound, and were properly rejected by the Court of Appeals.

In its Cape Canaveral decision, NMB maintained that in the light of the statutory purpose of RLA to provide a means for settling of labor disputes through the NMB processes so as to prevent interruption of commerce, it must take jurisdiction over non-transportation employees if the kind of work performed by them at Cape Canaveral is identical with the work of other employees in the same craft at Pan American's airline bases. This was so, NMB argued, because the community of interests between such employees performing identical kinds of work and operating under common executive controls was such as to make it likely that a strike of non-transportation employees would spread to Pan American's airline terminals.

There are several valid answers to this argument:

(1) The proliferation of labor dispute theory is irrelevant to questions of statutory construction under RLA.

As pointed out by Judge Nordbye in *Jackson* v. *Northwest Airlines*, *supra*, 70 F. Supp. 501, 513, the possibility that a strike of non-transportation employees may spread to the company's operating department is irrelevant to the question of statutory interpretation and does not "require universal application of the Railway Labor Act." As the Court correctly said:

> "The difficulty arises because the same union represents both branches of one company, not because of the effect and relationship of the modification work to the airline activities. Under defendant's theory, the application of the Railway Labor Act would be almost unlimited. Because a strike occurs in one branch of a company does not necessarily mean that one will occur in another

branch which is really unrelated to it, so far as mechanical work is concerned."

Because a strike occurs at NRDS, it would not necessarily follow that picketing would be extended to Pan American's airline terminals in Miami, New York, Los Angeles, or Guam, which have no functional relationship to the Nevada activity and are hundreds, if not thousands, of miles removed from it geographically. As Judge Nordbye acutely observed, such extension of the dispute would more likely arise in consequence of representation of workers at both facilities by a single union (TWU in this case), than because of any functional relationship. Proliferation of a labor dispute from NRDS to Pan American's airline bases would certainly be less probable where the dispute has its focal point in local agreements between Pan American and local building trades unions certified as bargaining representatives of NRDS employees by NLRB than where the dispute centers upon a single system-wide agreement under RLA between the Company and a nation-wide union.

In fact, recent nation-wide strikes involving airline pilots and flight engineers have pointed up the possibility that the real danger to be apprehended is not the proliferation of a labor dispute from Cape Canaveral or NRDS to an airline terminal—but the reverse, with important consequences to the nation's space effort. To guard against such a possibility, Pan American wrote into its current contract with TWU a provision that TWU members would continue work at GMRD installations, notwithstanding a strike at one of Pan American's airline terminals (R 17, TWU-Pan American contract, at page 7, following page 57). If RLA is inapplicable to NRDS, Pan American would be equally free, in negotiations with Respondent unions, to insist upon a contractual stipulation against the much less likely extension of a localized strike at NRDS to Pan American's airline terminals.

(2) The Court of Appeals applied the correct test of employer function which is the only workable basis for delimiting jurisdiction of NMB and NLRB.

By applying the "tenuous, negligible, remote" test to the *similarity of jobs* performed by *employees* in the carrier and non-carrier branches of the employer's business, rather than to the relationship of the functions being performed by the employer in the non-transportation phase of its business to the transportation phase, the NMB has given this test a new twist never intended by the Supreme Court in *Virginian R. Co., supra*, or by any court or administrative devisions following *Virginian*.

The two principles are obviously incompatible. The example given by the District Court (Pet. App. A, pp. 21a-22a) of the airline maintenance painter transferred to like duties at a shoe factory acquired by the carrier, is illustrative of the incompatibility. Under NMB's *employee* function test, RLA jurisdiction would follow the painter to the shoe factory, with an unwarranted encroachment upon NLRB jurisdiction resulting. Under the *employer* function test, it would not, and the painter working in the shoe factory would come under NLRB jurisdiction as intended by Congress. NMB's *employee* functions test is, therefore, contrary to the statutory scheme, completely unworkable, and would result in an unwarranted intrusion by NMB into non-transportation businesses, contrary to Congressional intent.

We suggest respectfully, moreover, that in adopting the *employee functions* test of coverage under RLA, the NMB may have fallen into the error of circular reasoning. It is one thing to say, where RLA jurisdiction over both branches of a carrier's business is unquestioned because both are part of its transportation activity, that for representation purposes all employees who perform similar work in the same craft or class at both installations and who are subject

to common executive control will be considered by the Board to be subject to a system-wide labor agreement covering that craft or class. It is quite another thing to say that a non-transportation branch of a carrier's business must be held as a matter of statutory interpretation to be covered by RLA *because* employees in that branch have similar skills and do similar work to that done by employees in the carrier's transportation business. This amounts to using a test which is valid for craft classification purpose *if RLA jurisdiction exists*, as a test for determining *that such jurisdiction exists.*

(3) The hypothetical shoe factory.

Petitioner belabors the obvious when it suggests that NRDS is not a shoe factory and its personnel are not shoemakers.

The Court of Appeals obviously used that hypothetical analogy because it found on the basis of the District Court record which it was reviewing (not on the basis of the record of NMB's 1956 Cape Canaveral ruling which was not under review by the Court) that a relationship between Petitioner's NRDS activities and transportation is just as "non-existent" as it would be had Petitioner been conducting a shoe factory at NRDS.

Under such circumstances, the Court's reference to a hypothetical shoe factory was most appropriate.

(4) Availability of other Federal laws and agencies.

NMB's Cape Canaveral doctrine mistakenly assumes that if a strike at Cape Canaveral (or NRDS) should proliferate and extend to Pan American's air line bases, no other Federal law or agency exists which could as effectually deal with the situation. The availability of other Federal laws and instrumentalities has already been noted.[10] The pos-

[10] See page 16 of this Brief.

sibility of guarding against such proliferation by contractual stipulation, as Petitioner did under its contract with TWU, has also been suggested.[11]

(5) Doctrine of Jackson v. Northwest Airlines is applicable in the context of the remedial purposes of RLA and LMRA.

Finally, Petitioner argues that *Jackson* v. *Northwest Airlines, supra*, which the Court of Appeals regarded as "directly in point," should not be regarded as controlling because that case was decided in the light of the remedial purposes of FLSA, rather than in the light of the purpose of RLA to provide a dispute-settling procedure so as to prevent interruption of interstate transportation.

But, as the Court of Appeals pointed out, the LMRA, as well as the FLSA, "applies to the generality of labor in the United States" (Pet. App. A, p. 13a), and "Both these generally applicable statutes are important charters of rights of working people," just as is RLA in its special realm of air and rail transportation (Pet. App. A, p. 14a). Consequently, it would seem that the remedial purposes of LMRA and the intent of Congress that it apply to the generality of labor must be given due weight in delimiting the boundary between LMRA and RLA.

Petitioner concedes that in the *Jackson* case, it may have been proper to give a strict construction to the RLA exemption to the overtime provisions of FLSA in order to effectuate the remedial purposes of FLSA, where the consequence of not doing so would have been to deprive the employees involved of statutory protection with respect to overtime. Why was it not equally proper for the Court below, having due regard to the remedial purposes and general applicability of LMRA to give narrow construction to

[11] See pages 16 & 25 of this Brief.

the RLA exemption of rail and air employees from the operation of LMRA (but a construction consonant with the language and purposes of RLA and with previous judicial interpretation thereof) where the consequence of not doing so would have been to subject employees not engaged in transportation activities to restraints not contemplated by LMRA, and to deprive them of rights of self organizaion, representation, and collective bargaining guaranteed by LMRA?

We think the conclusive argument is this: Even if the *Jackson* case is to be distinguished as having been decided in the light of the remedial purposes of FLSA, rather than in the light of the statutory purposes of RLA, a like distinction cannot be made with reference to the decision of this Court in *Virginian R. Co., supra*, or the holding of the Ninth Circut in *Anderson* v. *Bigelow, supra*. Both of these cases were decided under, and in the context of, the purposes of the Railway Labor Act. But the principles applied in holding, in the one case, that the commerce power extends, and, in the other case, that the RLA applies, only to employees of a rail carrier engaged in transportation activities, or those more than remotely, tenuously, or negligibly related thereto, are in full harmony with the holding in *Jackson, supra*, and the decision below.

Notwithstanding the fears of strike proliferation later expressed by NMB in its Cape Canaveral decision, neither the Supreme Court in *Virginia R. Co., supra*, nor the Ninth Circuit in *Anderson* v. *Bigelow, supra*, hesitated to apply the functional test of the closeness or remoteness of the employer's activity to its carrier business merely because a finding against jurisdiction under the Railway Labor Act might permit the strike to spread to the employer's carrier operations. In fact, in *Virginian R. Co., supra*, this Court made it clear that it found the required closeness to bring the case within the scope of the commerce power *because*

of the physical and functional relationship between the employer's "back shop," where its cars and locomotives were repaired, and its operating division, and not because of, but *"quite apart from the likelihood of its (the strike's) spreading to the operating department."* And, in *Anderson v. Bigelow, supra*, having found the RLA inapplicable to the rail carrier's over-the-road trucking department, the Court of Appeals dissolved a lower court injunction against a strike of the trucking department employees, on the ground that such strike was protected from Federal injunction by the Norris-LaGuardia Act.

CONCLUSION

The supposed dichotomy which Petitioner envisions as having been created by the decision below between Petitioner's Cape Canaveral employees over whom NMB has asserted jurisdiction, and its employees at NRDS whom the Court has held free of such jurisdiction, is more apparent than real, and presents no insoluble problems.

If the NMB was wrong, and the Court below right, it simply means that Pan American employees at both installations will have the right to petition the NLRB for representation, or craft-severance, elections so that the various crafts involved may bargain with Petitioner through representatives of their own choosing as contemplated by Sections 7 and 9 of the LMRA. That the process may result in the selection of different bargaining representatives at the two installations is a possibility inherent in the statutory plan. Nor is there anything anomalous or sinister in the possibility that Petitioner's labor relations with its airline pilots, flight engineers, and airplane mechanics at its airline bases may be governed by NMB, while its labor relations with the carpenter, electricians and plumbers at NRDS may be governed by NLRB. This would not be the

first occasion in which a statute has been held applicable to some employees of carrier, but not to others.[12]

The alternative to the above results would be the enforced application against Petitioner's carpenters, electricians, and plumbers at NRDS of a collective bargaining agreement to which they have never consented, negotiated by a bargaining agent whom they have never selected, under conditions unrelated to the economic realities of employment at an installation in the middle of the Nevada desert—in sum, a perpetuation of the very conditions which have brought the present labor dispute into being.

That an incidental consequence of denial of the writ will be to leave Respondent unions free to picket is not a cause for complaint if their picketing is legal, which both Courts below have inferentially found it to be. If such picketing is illegal, denial of NMB jurisdiction will not leave either Petitioner or the Government remediless, in view of the existence of other remedies under State and Federal law.

If this Court should be tentatively of the view that the case below was correctly decided on its merits, we ask the Court to bear in mind that because of the stay issued below, granting of the writ of certiorari would have the effect of prolonging the uncertainty in which both NMB and NLRB find themselves with respect to the question of their respective jurisdictions, would delay representation elections at NRDS until the final decision of this Court, and would, in the meanwhile, perpetuate the labor unrest which has brought this question before the Court. Denial of the writ would immediately end the existing uncertainty, permit both Federal agencies to proceed in their respective spheres, and free the NLRB to conduct the representation elections at NRDS which will terminate the present dispute.

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[12] *U.S. v. American Trucking Associations, supra; Northwest Airlines v. Jackson, supra.*

Dated: Washington, D. C.
February 5, 1964.

Respectfully submitted,

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APPENDIX "A"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AFFIDAVIT OF GEORGE RUDIAK

STATE OF NEVADA } ss:
COUNTY OF CLARK }

GEORGE RUDIAK, being first duly sworn, deposes and says:

I am the attorney for Building and Construction Trades Council of Clark, Lincoln, Nye and Esmeralda Counties, Nevada, its affiliated unions; and Teamsters Union Local No. 631, Respondents in the above entitled cause.

I represented Respondents in the District Court and before the Court of Appeals in the above entitled matter, and also in proceedings had before the National Mediation Board in its File No. C-3367. I am therefore familiar with all proceedings in these matters.

Attached hereto, marked Exhibit A-1, is a true copy of a telegram dated August 11, 1963 from James M. Arnold, Secretary of said Building and Construction Trades Council, to the National Mediation Board, denying any claim to represent Pan American employees at NRDS and also denying the jurisdiction of the Board.

On August 12, 1963, I personally mailed to the National Mediation Board a copy of the Reporter's Transcript of the oral decision rendered on August 2, 1963, by the District Court in the above entitled cause. A true copy of my letter of transmittal is attached, marked Exhibit A-2.

Attached hereto, marked Exhibit A-3, is a telegram dated August 15, 1963, from the NMB to James Ryan, President of said Building and Construction Trades Council, stating the time and place set for the NMB hearing.

Attached hereto, marked Exhibit A-4, is a true copy of a letter dated November 7, 1963, which I am informed and believe, and therefore allege, was sent by Roland C. Davis, attorney for Hotel and Restaurant Employees, etc. Union and its Culinary Workers' Union, Local 226, to NMB, transmitting a copy of the decision of the Court of Appeals to NMB and requesting reconsideration of the Board's decision.

Attached hereto, marked Exhibit A-5, is a true copy of a letter from Affiant to the NMB calling attention to the decision of the Court of Appeals, and requesting reconsideration of the Board's decision.

Attached hereto, marked Exhibit A-6, is a true copy of a letter dated November 15, 1963, from NMB to Affiant advising that the request for reconsideration of the Board's decision is under consideration.

Attached hereto, marked Exhibit A-7, is a true copy of a letter dated November 21, 1963, which I am informed and

believe, and therefore allege, was sent by Sherman, Dunn & Sickles, attorneys for the Building and Construction Trades Department of the AFL-CIO to NMB, joining in the request for reconsideration of its decision in view of the decision of the Court of Appeals.

Attached hereto, marked Exhibit A-8, is a true copy of a letter dated December 12, 1963, which I am informed and believe, and therefore allege, was sent to NMB by counsel for Pan American, informing the Board of the order of the Court of Appeals dated December 3, 1963, staying the Court's mandate pending filing by Pan American and disposition of a petition to the Supreme Court for a writ of certiorari.

After the rendition by the Court of Appeals of its decision, at a meeting of Respondent Building and Construction Trades Council at which I was present, it was decided by the Council to commence a drive to organize NRDS employees of Pan American, other than office employees. On December 5, 1963, after this drive had proceeded to a point at which Respondent Building and Construction Trades Council was of the opinion that it represented a majority of such employees, Respondent filed with the National Labor Relations Board, Twentieth Regional Office, a Petition for certification as bargaining representative of such employees. A true copy of said Petition is attached hereto, marked Exhibit A-9.

As of this date, to the best of my knowledge, information, and belief, the NLRB has taken no further steps to process this Petition. I am informed and believe, and therefore allege, that the reason for this delay is the pendency of Pan American's Petition to the Supreme Court of the United States for a Writ of Certiorari to review the decision of the Court of Appeals for the Ninth Circuit in Case No. 18,822, and the uncertainty caused by the pendency of such Petition as to whether the NMB or the NLRB has

jurisdiction over the employees affected.

(s) George Rudiak
GEORGE RUDIAK

SUBSCRIBED and SWORN to before me this 29th day of January, 1964.

(s) *Nubar Wright*
NUBAR WRIGHT (SEAL)
Notary Public in and for said county and state.
My Commission expires May 10, 1963.

EXHIBIT A-1

WESTERN UNION TELEGRAM

AUG. 11, 1963

TO E. C. THOMPSON, EXEC. SEC.
NATIONAL MEDIATION BOARD
1230 16TH STREET, N.W.
WASHINGTON, D. C.

REURTELS JULY 30 AND AUG. 7, PLEASE BE ADVISED THAT ON AUG. 2 UNITED STATES DISTRICT COURT FOR DISTRICT OF NEVADA IN SUIT FOR INJUNCTION BROUGHT BY PAN AMERICAN WORLD AIRWAYS AGAINST BUILDING TRADES COUNCIL AND ITS AFFILIATED UNIONS HELD THAT RAILWAY LABOR ACT DOES NOT APPLY TO PAN AMERICAN EMPLOYEES AT AEC NEVADA TEST SITE STOP. COPY OF COURT'S DECISION FOLLOWS BY MAIL STOP. IN VIEW OF DISTRICT COURT'S DECISION AND SINCE OUR UNIONS DO NOT PRESENTLY CLAIM TO REPRESENT PAN AMERICAN EMPLOYEES AT NEVADA TEST SITE, WE RESPECTFULLY DENY THE JURISDICTION OF NATIONAL MEDIATION BOARD TO HOLD ITS PROPOSED HEARING ON AUGUST 20.

BUILDING AND CONSTRUCTION TRADES COUNCIL
BY: JAMES M. ARNOLD, SECRETARY

EXHIBIT A-2

GEORGE RUDIAK
ATTORNEY AT LAW
Suite 201-202-203 Professional Building
425 Fremont Street
Las Vegas, Nevada
DUdley 2-1322, 2-1323

August 12, 1963

MR. E. C. THOMPSON
Executive Secretary
National Mediation Board
1230 16th Street, N.W.
Washington, D. C.

Dear Mr. Thompson:

With further reference to the night letter sent to you under date of August 11, 1963 by Mr. James M. Arnold, Secretary of the Building and Construction Trades Council of Clark, Lincoln, Nye and Esmeralda Counties, Nevada, I am enclosing herewith a copy of the Reporter's Transcript of the oral decision rendered on August 2, 1963 by the Honorable Roger Foley, District Judge of the United States District Court for the District of Nevada in Case No. 560, entitled "Pan American World Airways, Inc., Plaintiff v. United Brotherhood of Carpenters and Joiners of America, Local Union 1780, et al., Defendants."

Sincerely yours,
GEORGE RUDIAK
Attorney for Building and
Construction Trades Council

GR:hw
Enc.

EXHIBIT A-3

WESTERN UNION TELEGRAM

644A PDT AUG 15 63
OAO41
SYA179 SY WB022 PD
FAX WASHINGTON DC 15 919A EDT
JAMES RYAN, PRES BUILDING TRADES COUNCIL
212 WEST UTAH ST LAS VEGAS NAV

IN ACCORDANCE WITH NMB NOTICE OF HEARING 8-8-63 HEARING SCHEDULED AT LAS VEGAS, NEVADA WILL BE HELD 10AM, TUESDAY, 8-20-63 BEFORE BOARD MEMBER HOWARD GAMSER AT HEARING ROOM IN CONVENTION BUREAU, LAS VEGAS. BY DIRECTION OF NATIONAL MEDIATION BOARD. JOINT GOULARD, O'DONNELL, MILLER, RYAN, GIBBONS, BREEN, DENNIS, SMITH, GILDEA

E C THOMPSON EXEC SECY NMB

8-8-63 10 AM 8-20-63
(40).

EXHIBIT A-4

CARROLL, DAVIS, BURDICK & McDONOUGH
Counselors and Attorneys at Law
420 Balfour Building
San Francisco 4
November 7, 1963

NATIONAL MEDIATION BOARD,
Washington, D. C.

Re: Transport Workers Union of America,
AFL-CIO—Your file No. C-3367

Gentlemen:

Enclosed herewith please find a copy of a Decision and Opinion of the United States Court of Appeals for the Ninth Circuit in the matter of Pan American-World Airways, Inc. vs. United Brotherhood of Carpenters & Joiners of America, etc., et al., No. 18,822. As shown by this enclosed Opinion the question of the applicability of the Railway Labor Act to Pan American's NRDS at Jackass Flats, Nevada, and the jurisdiction of the National Mediation Board over this activity was directly considered by the Court of Appeals, and a direct finding was made by the Court that the Railway Labor Act is not applicable. Not only was your Board's reasoning in the Cape Canaveral case rejected by the Court, but through the cooperation of Pan American the Court had before it your decision in the instant matter before rendering its decision. As is to be seen from the footnote appearing on the last page of the Court's Opinion, the Court nevertheless refused to alter its findings, indicating that your decision in the instant matter, being based on the Canaveral reasoning, was likewise unsound and contrary to law.

We regret that your Board did not see fit to grant our request that you withhold your decision in the instant mat-

ter pending this advice from the United States Court of Appeals for the Ninth Circuit in the Pan American case. However, now that the Court has ruled we presume that you will wish to reconsider your decision in the instant matter and we hereby formally request that you undertake such reconsideration.

Yours very truly,
ROLAND C. DAVIS
Attorney for Hotel and
Restaurant Employees &
Bartenders International
Union, and its Culinary
Workers' Union, Local 226

RCD/bam
cc: Joseph A. Sickles, Esq., Sherman, Dunn & Sickles
1200 - 15th Street, N.W., Washington, D. C.
John F. O'Donnell, Esq., O'Donnell & Schwartz
501 Fifth Avenue, New York, N.Y.
Richard N. Randall, Esq., Chief Counsel's Staff of
Nevada Operations Office, Atomic Energy Commission
Box 1676, Las Vegas, Nevada
Jesse Freidin, Esq., Attorney at law
598 Madison Avenue, New York, N.Y.
David Previant, Esq., Attorney at law
212 West Wisconsin Avenue, Milwaukee, Wisconsin
Benjamin Gettler, Esq., Brown & Gettler
Transit Building, 6 E. Fourth Street, Cincinnati 2, Ohio

EXHIBIT A-5

GEORGE RUDIAK
ATTORNEY AT LAW
Suite 201-202-203 Professional Building
425 Fremont Street
Las Vegas, Nevada
DUdley 2-1322, 2-1323
November 11, 1963

NATIONAL MEDIATION BOARD
WASHINGTON, D. C.

In Re: Your File No. C-3367

Gentlemen:

Your attention is invited to the Decision of the United Court of Appeals for the Ninth Circuit in the matter of Pan American World Airways, Inc. vs. United Brotherhood of Carpenters and Jointers of America, et al, Case No. 18,882, which was rendered on November 5, 1963, and a copy of which is enclosed.

As you will observe, this decision constitutes a direct adjudication that the Railway Labor Act does not apply to the support activities of Pan American World Airways at the Nuclear Reactor Development Station, Nevada Test Site, Nye County, Nevada, and that the National Mediation Board is without jurisdiction over the labor relations of Pan American at this facility.

Inasmuch as the Court directly considered and rejected as legally unsound the decision of your Board with reference to Pan American's Cape Canaveral activity in your File No. C-2202 as well as the more recent decision of your Board in your File No. C-3367 pertaining specifically to Pan American's activity at NRDS, in view of the Court's ruling, we respectfully request that your Board reconsider and reverse its decision in File No. C-3367.

Please consider this letter a formal request for some reconsideration.

Very truly yours,
GEORGE RUDIAK

Attorney for Building and Construction Trades Council of Clark, Lincoln, Nye and Esmeralda Counties, Nevada, United Brotherhood of Carpenters & Joiners of America, Local Union 1780, Operative Plasterers & Cement Finishers International Association, Local Union 797, International Brotherhood of Electrical Workers, Local Union 357, International Union of Operating Engineers, Local Union 12, International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 433, International Hodcarriers and Common Laborers, Local Union 872, Brotherhood of Painters, Decorators and Paperhangers of America, Local Union 159, Sheet Metal Workers, International Association Local Union 88, Plumbers and Pipefitters Local Union 525, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 631.

GR:vl

cc: Joseph A. Sickles, Esq., Sherman, Dunn & Sickles
1200 - 15th Street, N.W., Washington, D. C.
John F. O'Donnell, Esq., O'Donnell & Schwartz
501 Fifth Avenue, New York, New York
Jesse Freidin, Esq., Attorney at Law
598 Madison Avenue, New York, New York
David Previant, Esq., Attorney at Law
212 West Wisconsin Avenue, Milwaukee, Wisconsin
Richard N. Randall, Esq., Chief Counsel's Staff of
Nevada Operations Office, Atomic Energy Commission
Box 1676, Las Vegas, Nevada
James M. Arnold, Secretary, Building & Construction
Trades Council of Clark, Lincoln, Nye and Esmeralda
Counties, Nevada
212 W Utah Street, Las Vegas, Nevada

William F. Carter, Teamsters Local Union No. 631
307 Wall Street, Las Vegas, Nevada
Benjamin Gattler, Esq., Brown & Gattler
Transit Building, 6 E. Fourth Street, Cincinnati 2, Ohio
Roland C. Davis, Esq.
420 Balfour Building, San Francisco 4, California

EXHIBIT A-6

NATIONAL MEDIATION BOARD
WASHINGTON
November 15, 1963
File No. C-3367
PAWA - TWU

GEORGE RUDIAK, ESQ.
Attorney at Law
425 Fremont Street
Las Vegas, Nevada

Dear Mr. Rudiak:

This will a knowledge receipt of your letter of November 11, 1963, in which you request a reconsideration of our preliminary decision with regard to jurisdiction of this Board in the above entitled matter. At the present time a question concerning the Board's position in light of the litigation to which you referred is under consideration. Until a determination is made, it will not be possible for us to definitely deal with your request.

It is our hope that we will be able to be responsive within the near future.

Very truly yours,

/s/ E. C. THOMPSON
Executive Secretary

cc: Joseph A. Sickles, Esq., Sherman, Dunn & Sickles
1200 - 15th Street, N.W., Washington, D. C.
Roland C. Davis, Esq., Attorney at Law
Carroll, Davis, Burdick & McDonough
420 Balfour Building, San Francisco 4, California
John F. O'Donnell, Esq., O'Donnell & Schwartz
501 Fifth Avenue, New York, New York
Benjamin Gettler, Esq., Brown and Gettler
Transit Building 6 E. Fourth Street, Cincinnati 2, Ohio

Jesse Freidin, Esq., Attorney at Law
59 Madison Avenue, New York, New York
David Previant, Esq., Attorney at Law
212 West Wisconsin Avenue, Milwaukee, Wisconsin
Richard M. Randall, Esq., Chief Counsel's Staff of
Nevada Operations Office, Atomic Energy Commission
Box 1676, Las Vegas, Nevada

EXHIBIT A-7

SHERMAN, DUNN & SICKLES
1200 Fifteenth Street, N.W.
Suite 500
Washington 5, D. C.
North 7-0155

LOUIS SHERMAN, THOMAS X. DUNN, JOSEPH A. SICKLES,
LAURENCE J. COHEN

November 21, 1963

NATIONAL MEDIATION BOARD
Washington
District of Columbia

Re: Pan American Airways - TWU
Case No. C-3367

Gentlemen:

On November 7 and November 11, Roland C. Davis, Esquire, representing the Hotel and Restaurant Employees Local 226, and George Rudiak, Esquire, representing the Building and Construction Trades Council of Clark, Lincoln, Nye and Esmeralda Counties of Nevada, etc., corresponded with you requesting reconsideration of your decision in the subject case.

It is noted that on November 15 you responded to both gentlemen stating that you would be responsive to said request in the near future.

Please be advised that the Building and Construction Trades Department of the AFL-CIO joins in respectfully requesting you to reconsider your decision in the subject matter based upon the decision of the United States Court of Appeals for the Ninth Circuit in *Pan American World*

Airways, Inc. v. *United Brotherhood of Carpenters, et al*, Case No. 18,822.

Very truly yours,

SHERMAN, DUNN &
SICKLES
JOSEPH A. SICKLES

cc: Roland C. Davis, Esq., Carroll, Davis, Burdick & McDonough
420 Balfour Building, San Francisco 4, California
George Rudiak, Esq.,
425 Fremont Street, Las Vegas, Nevada
John F. O'Donnell, Esq., O'Donnell & Schwartz
501 Fifth Avenue, New York, New York
Richard M. Randall, Esq., Chief Counsel's Staff of Nevada Operations Office, Atomic Energy Commission
Box 1676, Las Vegas, Nevada
Jesse Freidin, Esq.
598 Madison Avenue, New York, New York
David Previant, Esq.
212 West Wisconsin Avenue, Milwaukee, Wisconsin
Mr. Al Bramlet, Culinary Workers Union Local 226
P.O. Box 1430. Las Vegas, Nevada
Benjamin Gettler, Esq., Brown & Gettler
Transit Building, 6 E. Fourth Street, Cincinnati 2, Ohio

EXHIBIT A-8

OLETTI FREIDIN PRASHKER & HARNETT

December 12, 1963

AIR MAIL
NATIONAL MEDIATION BOARD
WASHINGTON, D. C.

Re: File No. C-3367

Gentlemen:

Various labor organizations who are interested parties in this proceeding have called the attention of the Board to the opinion of November 5, 1963 of the United States Court of Appeals for the Ninth Circuit in *Pan American World Airways, Inc.*, v. *United Brotherhood of Carpenters and Joiners of America, Local Union 1780, et al.*, No. 18,822.

The Board should be advised, we think, of the order of the Circuit Court of Appeals, dated December 3, 1963, (a copy of which we enclose) which stayed the Court's mandate and continued in effect its injunction maintaining the status quo at the Nuclear Rocket Development Station, pending the filing by Pan American and disposition of a petition to the Supreme Court of the United States for a writ of certiorari to review the Ninth Circuit's decision.

Very truly yours,

POLETTI FREIDIN
PRASHKER & HARNETT
By
MURRAY GARTNER
Attorneys for Pan American
World Airways, Inc.

MG:imt
Enc.
cc: Roland C. Davis
George Rudiak

John F. O'Donnell
Thomas O. Fleming
David Previant
Benjamin Gettler
J. W. Brown
Joseph A. Sickles

EXHIBIT A-9

Form NLRB-502 (11-59)

Form approved.
Budget Bureau No. 64-R002 12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PETITION

DO NOT WRITE IN THIS SPACE

Case No. 20-RC-5720
Date Filed 12-5-63

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition *(Check only the one box which is appropriate)*

A. [X] RC—CERTIFICATION OF REPRESENTATIVES (INDIVIDUAL, GROUP, LABOR ORGANIZATION).—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to section 9 (a) and (c) of the act.*

B. [ ] RM—REPRESENTATION (EMPLOYER).—One or more individuals or labor organizations have

presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in section 9(a) of the act.*

C. [ ] RD—DECERTIFICATION.—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in section 9(a) of the act.*

D. [ ] UD—WITHDRAWAL OF UNION SHOP AUTHORITY.—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

*NOTE.—If a charge under section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.

2. Name of Employer—**Pan American Airways, Inc.**
Employer Representative to Contract—**Everett Goulard**
Phone No. **384-2252**

3. Address(es) of Establishment(s) Involved *(Street and number, city, zone, and State)*
N R D S Areas 400 Series, Mercury, Nevada

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*—**Space and Missile Site**

4b. Identify Principal Product or Service—**Maintenance, Operation and Support**

5. Description of Unit Involved *(If more space is needed, continue on another sheet)*
Included—**All personnel except office employees**

Excluded—**Office employees**

6a. Number of Employees in Unit—**140**

6b. Is this Petition Supported by 30% or More of the Employees in the Unit? ☒ Yes ☐ No

(If you have checked box RC in 1.A. above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. [**X**] Request for recognition as Bargaining Representative was made on **November 29, 1963** and Employer declined recognition on or about **no reply** *(If no reply received, so state)*

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent *(If there is none, so state)*

Name—**None**

Address

Affiliation

Date of Recommendation or Certification

9. Date of Expiration of Current Contract, if any *(Show month, day, and year)*

Not known

10. If you have checked Box UD in I.D. above, show here the date of execution of agreement granting union shop *(Month, day and year)*

.....

11a. Is there now a strike or picketing at the employer's establishment(s) involved?

X Yes..... No—**XX**

11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of

..... — ....., a Labor
(Insert name)

Organization of.....
(Insert address)

Since .....
(Show month, day, and year)

12. Organizations or Individuals other than Petitioner (and other than those named in Items 8 and 11c), which have claimed recognition as Representatives, and other Organizations and Individuals known to have a Representative Interest in any Employee in the Unit described in Item 5 above. (If none, so state.)

Name—**Transport Workers Union**

Affiliation—**AFL-CIO**

Address—**Washington, D. C.**

Date of Claim *(Required only if Petition is filed by Employer)*

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Building and Construction Trades Council, Affiliated Crafts, Stationery Engineers #501 and Teamsters Local #631

.....
(Petitioner and affiliation, if any)

By..... .....**Secretary**.....
(Signature of representative or persons filing petition) *(Title, if any)*

Address—212 W. Utah St., Las Vegas, Nevada 384-8400

(Street and number, city, zone, and State *Telephone number)*

Willfully false statement on this Petition can be punished by fine and imprisonment (U.S. Code, Title 18, Section 100)